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No. 03-__

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IN THE

Supreme Court of the United States

ALLSTATE CORPORATION, *et al.*,
Petitioners,

v.

JOSE C. DEHOYOS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of pervasive state regulation of insurance ratemaking, the imposition of "disparate impact" liability under the Fair Housing Act, 42 U.S.C. § 3604, on insurance companies' use of race-neutral credit scoring and similar mechanisms in assessing risk and setting the price of insurance products is precluded by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

PARTIES TO THE PROCEEDING

Petitioners, who were defendants and appellants below, are The Allstate Corporation, Allstate Insurance Company, Allstate Texas Lloyd's, and Allstate Indemnity Company.

Respondents, who were plaintiffs and appellees below, are Jose C. DeHoyos, Eva Perez-DeHoyos, Georgia Harrison, Charles White, Sheryl H. Franks, and Martel Shaw. This case was brought as a nationwide class action, but no class has been certified.

CORPORATE DISCLOSURE STATEMENT

The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation. Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation. Allstate Indemnity Company is a wholly-owned subsidiary of Allstate Insurance Company. Allstate Texas Lloyd's, Inc., a Texas corporation, is the attorney-in-fact for Allstate Texas Lloyd's. Allstate Texas Lloyd's, Inc. is a wholly-owned subsidiary of Allstate Insurance Company.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Allstate Corporation, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 345 F.3d 290. The opinion of the district court (App. 21a-29a) is unpublished, but is found at 2002 WL 1491650.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2003. A timely petition for rehearing was de-

nied on November 25, 2003. App. 31a-32a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

2. The Fair Housing Act, 42 U.S.C. § 3604, provides in pertinent part:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin [or]
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin . . . .

STATEMENT

1. Credit Scoring and Insurers' Evaluation of Risk

This case involves a challenge under the Fair Housing Act (FHA), 42 U.S.C. § 3604, to a practice, known as credit scoring, that is commonly used by insurers to set prices for their products. In a perfect world, an insurer would know beforehand whether any individual policyholder would suffer a reimbursable loss. Because such clairvoyance is impossible in the real world, insurers attempt to predict the likelihood

that a particular policyholder will suffer such a loss by analyzing a wide variety of factors. These factors can be roughly divided into three categories: what, where, and who. The "what" category includes, for example, the model and year of a policyholder's automobile, or the size and construction of a policyholder's home; the "where" category includes the location of a policyholder's automobile or home, and the risk of loss from crime, fire, and weather associated with that location. The "who" category includes the prior loss experience of the policyholder, the policyholder's age and gender (for automobile insurance), the policyholder's health (for life insurance), and the number of persons residing with the policyholder (for homeowners insurance). Credit scoring fits squarely into the "who" category and is a logical extension of risk-rating mechanisms traditionally used by insurers.[1]

Numerous studies have endorsed the validity of credit scoring as a predictor of risk of loss. For example, a recent study commissioned by the Texas legislature found a strong correlation between credit history and the likelihood of experiencing an insurance loss.[2] Other studies have shown

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[1] Federal law has recognized the validity of credit scoring for many uses. The usefulness of such data for insurance purposes is reflected in the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*, in which Congress authorized credit reporting agencies to share such data with insurers. 15 U.S.C. § 1681b. The FCRA also contemplates that insurers may take "adverse action" based upon credit information, including raising rates, § 1681a(k)(1)(B)(i), as long as notice is provided to the consumer, *see* § 1681m(a).

[2] Researchers at the University of Texas, studying 153,326 policies from Texas insurers, found that policyholders in the worst decile of credit score experienced losses 53% higher than the expected average, as compared to policyholders in the top decile of credit score, who incurred losses 25% less than the expected average. *See* Bruce Kellison et al., Bureau of Business Research, McCombs School of Business, The University of Texas at Austin, *A Statistical Analysis of the Relationship Between Credit History and Insurance Losses*, at 10-11 & Chart 6 (2003), http://www.utexas.edu/depts/bbr/bbr_creditstudy.pdf.

similar results.[3] Such empirical data confirm the commonsense conclusion that an insured's credit history may provide crucial information about the insured's risk of loss. As the Insurance Information Institute has noted, "[i]t is not surprising that financially stable individuals are more likely to exhibit stability in other aspects of their lives, whereas financial stress can lead to distractions or other behaviors that produce more losses[.]"[4]

Of course, it is entirely possible that credit scoring—like any other rating factor—may affect, in the aggregate, different groups in different ways at different times. More often than not, rating factors do affect some groups more than others. For example, when life insurers began to charge higher rates for smokers, average rates increased for men but decreased for women, because men were more likely to smoke than women. Similarly, charging higher rates for automobile or homeowners insurance in areas exposed to greater risk of loss may result in higher rates for groups that are disproportionately likely to live in those areas.

Increased precision in predicting the likelihood of loss benefits the general public. When insurers can predict with greater accuracy which policyholders are likely to suffer a loss, they are better able to ensure that no one pays more for insurance than his or her risk of loss warrants. The use of rate-setting factors that are shown to be effective in evaluat-

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[3] *See* Robert P. Hartwig & Claire Wilkinson, Insurance Information Institute, *The Use of Credit Information in Personal Lines Insurance Underwriting*, at 5-7 (June 2003), *available at* http://server.iii.org/yy_obj_data/binary/729782_1_0/Credit.pdf (collecting studies); James E. Monaghan, *The Impact of Personal Credit History on Loss Performance in Personal Lines*, Casualty Actuarial Society Forum (Winter 2000), http://www.casact.org/pubs/forum/00wforum/00wf079.pdf; Michael J. Miller & Richard A. Smith, EPIC Actuaries, LLC, *The Relationship of Credit-Based Insurance Scores to Private Passenger Automobile Insurance Loss Propensity* (June 2003), *available at* http://www.mdinsurance.state.md.us/documents/Ex9-EpicStudy.pdf.

[4] Hartwig & Wilkinson, *supra*, at 5.

ing risk of loss therefore works to the advantage of insurance sellers and insurance purchasers alike.

2. State Regulation of Insurance

a. Rate-setting and the factors used to set rates, including credit scoring, are at the heart of state regulation of insurance. As this Court has observed on numerous occasions, the business of insurance has been regulated by the States throughout our nation's history. *See, e.g., Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 316 (1955). In 1944, the Court held for the first time that insurance transactions fall within Congress's power to regulate commerce. *See United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Congress acted swiftly to restore state primacy in insurance regulation by enacting the McCarran-Ferguson Act (MFA) in the following year.

Section 1 of the MFA provides that "continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. Section 2(b) further provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance[.]" 15 U.S.C. § 1012(b). In enacting Section 2(b), "Congress ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation." *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 306 (1999).

State regulation of insurance is pervasive. Every State has in place an administrative regime regulating the provision of insurance. Each State has a department of insurance or similar agency. States regulate the kinds of policies that insurers may offer, as well as coverage levels and rates under policies.

Despite differences among these regulatory regimes, three goals are common to all.[5] First, state regulation is intended to ensure that rates are adequate. If an insurer charges rates that are too low in an effort to build market share, it may earn insufficient income to pay future claims. Because an insurer's collapse could have catastrophic consequences for policyholders, States require adequate rates to preserve insurers' solvency. Second, state regulation is intended to ensure that rates are not excessive. Third, States proscribe rates that are unfairly discriminatory. This rule is generally understood to prohibit differential treatment of applicants or policyholders who present similar risks of loss. The rule ensures that rates charged reflect actual differences in expected loses, expenses, or both. *See* Lee R. Russ, *Couch on Insurance* §§ 2.31, 69.12 (3d ed. 2003); Kathleen Ettlinger et al., *State Insurance Regulation* 29-30 (1995).

Balancing these competing goals necessarily requires policy judgments. The weight given to each policy consideration and the methods enlisted to further diverse regulatory purposes may vary widely among States. Moreover, because the spreading of risk ultimately affects all citizens of a State, state insurance regulation is based upon the public interest as a whole. Each State has designed an insurance-specific statutory framework to protect the public interest and has delegated to regulators the authority to make the necessary policy judgments. Indeed, the authority of state insurance regulators to supervise insurance ratemaking is often described as "legislative" or "quasi-legislative."[6]

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[5] In general, state systems of rate regulation vary as to whether insurers are allowed to set their own rates or required to use state-mandated rates, whether prior regulatory approval is necessary to use rates, and as to the type of regulatory filing that is required. Even if no filing or approval is required, the regulator may investigate rates and require their correction if they violate regulatory standards. *See* Kathleen Ettlinger et al., *State Insurance Regulation* 64 (1995).

[6] *See, e.g., Insurance Comm'r* v. *CareFirst of Maryland, Inc.*, 816 A.2d 126, 146 (Md. Ct. Spec. App. 2003); *Commonwealth ex rel. Chandler* v. *Anthem Ins. Cos.*, 8 S.W.3d 48, 52-53 (Ky. Ct. App. 1999); *State Com-*

b. Texas has a comprehensive regulatory regime governing insurance ratemaking.[7] The Texas legislature has prohibited unfair discrimination in insurance rates, *see* Tex. Ins. Code arts. 21.21-6, 21.21-8, and has vested the Texas Department of Insurance with broad enforcement powers, including the ability to impose penalties and to issue cease and desist orders, s*ee generally* Tex. Ins. Code §§ 82.001–84.051. Among other sanctions, the Commissioner of Insurance may direct the insurer "to make complete restitution to each Texas resident [or entity] that is harmed by a violation of, or failure to comply with, this code or a rule of the commissioner." Tex. Ins. Code § 82.053.

Under a statutory scheme in place until 2003, the Texas Department of Insurance had, with two exceptions, the sole and exclusive power and authority to fix the range of premium rates to be charged and collected by insurers for

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pensation Ins. Fund v. *Brown*, 38 Cal. Rptr. 2d 98, 103 (Cal. Ct. App. 1995); *Massachusetts Auto. Rating & Accident Prevention Bureau* v. *Commissioner of Ins.*, 453 N.E.2d 381, 394-395 (1983); *Berry* v. *Lindsay*, 182 S.E.2d 78, 82-83 (S.C. 1971); *cf. Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U.S. 581, 589 (1945) ("Rate-making is essentially a legislative function.").

The Texas Supreme Court has struck down, as a violation of the separation-of-powers clause of the Texas Constitution, a statute that authorized courts, upon invalidating rates promulgated by state insurance regulators, to set their own rates as a remedy. *See Daniel* v. *Tyrrell & Garth Inv. Co.*, 93 S.W.2d 372, 375-376 (Tex. 1936); *see also State* v. *Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 530 (Tex. 1975) (" 'It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act.' " (quoting *Interstate Com. Comm'n* v. *Railway Co.*, 167 U.S. 479, 499 (1897)).

[7] Because this lawsuit was brought as a putative nationwide class action, the insurance laws of all 50 States are relevant to the question of preemption under the MFA. The regulatory scheme of Texas is presented here for illustrative purposes, in the interest of brevity and because the named plaintiffs whose claims against petitioners are directly at issue reside in Texas. *See infra* p. 9 & n.11.

homeowners insurance in Texas.[8] *See* Tex. Ins. Code arts. 5.01, 5.01-2, 5.25 (art. 5.01-2 repealed 2003). Premiums were calculated from insurers' filed rates based on a rating manual of classification and territories promulgated or approved by the commissioner. *See id.* arts. 5.01, 5.01-2, 5.25. Insurers subject to direct rate regulation were required to charge, on a "file and use" basis, rates within a "flexibility band" of a benchmark rate promulgated by the Department in such a way as to yield rates that were "just, reasonable, adequate, and not excessive for the risks to which they apply, and not confiscatory." *See id.* art. 5.101. For all insurers, the Department bore responsibility for determining, on an annual basis, whether any rate rollbacks were necessary in order to ensure that rates were "adequate, not unfairly discriminatory, nonconfiscatory, and not excessive." *Id.* art. 5.131, § 3(c).

Sweeping insurance reform in 2003 updated the Texas insurance scheme and granted the Department further power to regulate all insurers. *See* Act of June 11, 2003, 2003 Tex. Sess. Law Serv., ch. 206 (Vernon) ("June 11 Act"). In the wake of the 2003 reforms, homeowners insurance rates are subject to prior approval until December 1, 2004, and are governed by a "file and use" system following that date. *See* Tex. Ins. Code arts. 5.13-2, 5.142. Any rating scheme may be enjoined by the Department if it is excessive, inadequate, unreasonable, or unfairly discriminatory. *See id.* arts. 1.02, 5.13-2, 5.26-1, 5.142, 5.144; June 11 Act, art. 6.

The Texas insurance reform of 2003 directly addressed credit scoring and made explicit what had been implicit in Texas for many years: the use of credit scoring, as one factor

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[8] "County mutual" and "Lloyd's plan" insurers were not bound by this range, although the Commissioner prescribed the form of their insurance policies and required an independent examination of their financial condition to assure solvency. *See* Tex. Ins. Code arts. 1.15A, 5.35, 17.25, 18.23 (arts. 17.25, 18.23 repealed 2003). Such insurers were, however, subject to the statutes that proscribed unfair discrimination in the provision of insurance. *See infra* pp. 18-19 & n.18.

in determining a policyholder's risk of loss, is permissible to ensure that all policyholders pay rates commensurate with their risk of loss. The 2003 law provides that insurers may use credit scoring to develop rates, rating classifications, or underwriting criteria, as long as the scoring system is based on sound actuarial principles and the use of credit scoring is disclosed to each applicant.[9] The law makes Texas one of at least 39 States that have passed laws providing for, and regulating, the use of credit scoring to calculate insurance rates.[10]

3. Proceedings Below

a. Respondents Jose C. DeHoyos and Eva Perez-DeHoyos, who are residents of Texas, allege that Allstate Corporation and its subsidiaries (collectively "Allstate") violated the FHA and 42 U.S.C. §§ 1981 and 1982 in setting premiums for homeowners insurance policies. Compl. ¶¶ 6, 79-96. The FHA claim rests principally on the contention that Allstate's use of race-neutral credit scoring programs to evaluate individuals' risk and to set the price of insurance products offered to individuals had an impermissible disparate impact on non-Caucasians. Compl. ¶¶ 91-96.[11] Respon-

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[9] The Texas law imposes several further conditions on the use of credit scoring: any action based upon a credit score that results in an adverse effect must be disclosed to the applicant; no decision may be made on the basis of credit scoring alone; and reasonable exceptions to the use of credit scoring must be provided for applicants whose credit information has been affected by catastrophic illness, unemployment, divorce, death of a close family member, or identity theft. The law mandates that all credit scoring models must be filed with the Texas Department of Insurance, and authorizes a study to determine "any disproportionate impact on any class of individuals, including classes based on income, race, or ethnicity, resulting from the use of credit, to the extent that information is readily available." Tex. Ins. Code art. 21.49-2U.

[10] *See* National Association of Mutual Insurance Companies, *Current State Laws and/or Regulations Governing Credit-Based Scoring* (last updated Dec. 2003), http://namic.org/state/creditregulations.asp .

[11] Four other individuals, who are residents of Florida and Texas, are also named plaintiffs against Allstate in this action. Those plaintiffs purchased only automobile insurance, not homeowners insurance, from

dents seek certification of a nationwide class consisting of all non-Caucasian persons who at any time had an ownership interest in a policy that was issued, serviced, or administered by Allstate based upon the common course of conduct described in their complaint. *Id.* ¶¶ 2, 66-78. Such a class would consist of "hundreds of thousands of persons." *Id.* ¶ 68. Respondents demand a jury trial. *Id.* at 22.

Allstate moved to dismiss, contending, *inter alia*, that respondents' FHA claims are precluded by Section 2(b) of the MFA, which provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ... unless such Act specifically relates to the business of insurance[.]"[12] 15 U.S.C. § 1012(b). Allstate relied on this Court's decision in *Humana*, *supra*, which held that a federal law may be applied to insurance if and only if "[1] federal law does not directly conflict with state regulation, and [2] when application of the federal law would not frustrate any declared state policy or [3] interfere with a State's administrative regime." 525 U.S. at 310 (bracketed numerals added). Allstate argued that imposing disparate-impact liability based on insurance rates would interfere with the States' administrative regimes that govern those same rates, and thus would run afoul of the third prong of the *Humana* test. The district court denied the motion to dismiss, but certified the question for interlocutory appeal. App. 21a-29a; 1a-2a.

Allstate. Compl. ¶¶ 7-10. Their claims arise only under 42 U.S.C. §§ 1981 and 1982, which proscribe only intentional discrimination. *See Patterson* v. *McLean Credit Union*, 491 U.S. 164, 185 (1989); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 391 (1982). Their claims therefore do not implicate the disparate-impact theory under the FHA or the particularly disruptive effect that disparate-impact law would have on state insurance regulation.

[12] It is undisputed that the FHA does not "specifically relate[] to the business of insurance." *See* App. 8a.

b. A divided panel of the court of appeals affirmed, ruling that the MFA does not preclude disparate-impact liability under the FHA for an insurer's rates. App. 1a-19a.

The majority first pointed to prior appellate decisions that had approved the application of the FHA to homeowners insurance, notwithstanding the MFA. App. 5a-7a & n.4. Those decisions, however, involved alleged *intentional* racial discrimination in insurance rates. Furthermore, all but one of the decisions predated *Humana* and reflected an erroneous construction of the MFA, rejected in *Humana*, that federal law could be applied to insurance "whenever the federal law does not collide head on with state regulation," 525 U.S. at 309.

The majority then stated that Allstate had not "identif[ied] a state law or policy that would be impaired by the application of the federal statutes." App. 8a.[13] The court thereby elided the distinction between the second prong of the *Humana* test, which asks whether the federal law would "frustrate any declared state policy," and the third prong of the test, which involves a broader inquiry as to whether application of the federal law would "interfere with a State's administrative regime."[14] The majority also suggested that Allstate's argument based on the third *Humana* prong was nothing more than a "field preemption" argument to the ef-

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[13] The panel did note that Texas had recently passed a law regulating credit scoring, but dismissed the law as irrelevant because it was not retroactive, *see* App. 8a-9a & n.5, despite the fact that plaintiffs seek injunctive and prospective relief.

[14] For example, the majority stated that, to be ousted by the MFA, "[t]he approach of the federal statute must tread upon a declared policy goal of the state scheme," App. 11a, and then found the *Humana* test not satisfied in this case because Allstate had not pointed to any state law, regulation, or decision specifically "requiring or condoning" the credit-scoring practice challenged by respondents, App. 11a (brackets and ellipsis omitted); *see also* App. 15a-16a n.11 (dissent of Judge Jones, setting forth other places where majority conflated second and third *Humana* prongs and incorrectly required a direct conflict between federal law and state policy).

fect that federal law should not apply to insurance whenever a "state has a mechanism in place for performing an insurance-related function." App. 11a. But the court did not consider the potential for a clash between federal and state authorities posed by the application of disparate-impact liability to insurance. In particular, it did not consider that federal courts would be called upon to invalidate insurance rates approved or accepted by state insurance regulators as consistent with state actuarial standards (including prohibitions against discriminatory ratemaking) on the ground that some other rate structure might have a less disparate effect on non-Caucasians.

c. Judge Jones, in dissent, concluded that applying disparate-impact liability to insurance would interfere with state administrative regimes in a manner that would run afoul of the MFA. As Judge Jones stated, "a disparate impact claim goes to the heart of the risk adjustment that underlies the insurance business," because "[e]very insurer sets its prices according to the risk embodied in covering particular categories of customers." App. 13a. She further observed that state insurance commissions "are set up to regulate rates by overseeing the insurance companies' assessment of risks and differential pricing decisions," and that, "[n]o matter the exact statutory regime under which the commissions go about their business, they are called upon to balance, verify and make a quasi-legislative determination concerning the adequacy and appropriateness of rates." App. 14a.

Applying disparate-impact liability to insurance would interfere with state regulatory regimes, Judge Jones concluded, because respondents "are asking the federal courts to examine one thread from the regulatory fabric, while state insurance commissioners remain responsible for the whole." App. 14a. For example, in a disparate-impact lawsuit, "any *post hoc* declaration that credit scoring is impermissible will require a federal court to determine . . . what a fair and 'non-discriminatory' rate for the plaintiffs' policies would have been." App. 16a. Because that exercise will re-

quire the federal court to identify the proper insurance rate that should have been charged, "[a] more complete overlap with the state insurance commissions' pricing decisions is impossible to conceive." *Id.*

Judge Jones also stressed that, because Texas and other states do not permit private lawsuits to challenge insurance commissions' decisions about rates, allowing a federal disparate-impact lawsuit to go forward would also interfere with the "corrective procedures utilized by the states." App. 17a. She concluded by observing that "at the very core of the McCarran-Ferguson Act is the insulation of state regulation regarding the fixing of insurance rates from federal laws not specifically directed towards regulating insurance," App. 18a, and that "federal courts are not competent to tread in the essential domain reserved to state regulators," App. 18a-19a.

REASONS FOR GRANTING THE PETITION

Since this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the federal courts have wrestled with disparate-impact claims in contexts ranging from employment to educational testing. Extending the disparate-impact theory of discrimination to insurance, however, would be a momentous step. Grouping is fundamental to insurance, and the process of classification inherent in risk assessment must inevitably have an adverse effect on some groups of individuals. It is unavoidable that some categories of persons will present greater risk than others. As Judge Jones stated, "[e]very insurer sets its prices according to the risk embodied in covering particular categories of customers." App. 13a.

To protect the public interest, States have established administrative regimes to regulate insurance, under which regulators vigorously watch for and curtail unfair discrimination in risk assessment. These regulatory regimes can be extraordinarily complex, for they usually embody numerous (and sometimes competing) policy objectives. For example, most state regulatory regimes are designed to make certain

not just that insurers not overcharge customers, but also that insurers remain solvent over the long term in order to pay claims in the far future. Charging too little, or too little to the wrong categories of customers, can be as damaging as charging too much.

Disparate-impact claims under federal civil rights laws such as the FHA cannot be reconciled with the States' comprehensive system of insurance regulation. The FHA was not designed for application to insurance ratemaking, and the extension of disparate-impact liability to insurance under federal law would work a dramatic and disruptive change in the way that insurance rates are regulated. Federal courts would be called upon to invalidate insurance rates and to set aside rate structures that state regulators had approved or accepted in the exercise of their quasi-legislative authority—including rate structures that state regulators had concluded did not result in unfair discrimination under state insurance law. Moreover, in fashioning any remedy, federal courts would unavoidably become entangled in the States' carefully calculated administrative regimes for overseeing insurance rates. A federal court's conclusion that an insurer's use of a particular factor to assess risk had resulted in an impermissible disparate impact would require the insurer to develop an alternative mechanism of risk assessment with a less disparate impact. Any such alternative mechanism, however, would necessarily have an adverse impact on some other group that might well implicate, and possibly conflict with, other state insurance policies.

Fortunately, Congress has anticipated the possibility that the application of federal law might interfere with state insurance regulation in such a manner, and has acted to preclude it. Section 2(b) of the MFA provides that federal law shall not be construed in such a manner as to "impair" any state law that regulates insurance. As this Court held in *Humana*, this prohibition against "impairment" of state insurance regulation includes a bar against applying federal law to insurance if federal law would "interfere with a State's administrative regime." That is exactly this case.

Given the enormous disruption of state insurance regulation that will follow if the disparate-impact theory of liability under federal civil rights laws is extended to insurance, the Court should grant review to make clear that the MFA bars the application of disparate-impact claims to insurance.[15]

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[15] The court of appeals apparently decided this case on the assumption that respondents may state a claim under the FHA (a) on a disparate-impact theory and (b) concerning the pricing of homeowners insurance. This Court has expressly reserved the question whether disparate-impact claims may be brought at all under the FHA, *see Town of Huntington, N.Y.* v. *Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam), but the Fifth Circuit has held that such claims may be brought, *see Simms* v. *First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996). In addition, this Court has not decided whether the FHA covers the provision of homeowners insurance, but the Department of Housing and Urban Development (HUD) has promulgated a regulation applying the FHA (or, at a minimum, its prohibition against *intentional* discrimination) to insurance. *See* 24 C.F.R. § 100.70(d)(4).

Two courts of appeals have held the FHA may be applied to insurance. *See Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992). Both courts, however, expressly declined to decide whether insurers may be subjected to *disparate-impact* liability under the FHA. *See Nationwide*, 52 F.3d at 1362-1363; *NAACP*, 978 F.2d at 290. To our knowledge, HUD, which administers the FHA, has never argued in litigation that a disparate-impact claim may be brought with respect to insurance, and in *Nationwide*, the Sixth Circuit relied on the fact that HUD had never applied disparate-impact analysis to insurance to conclude that a challenge brought by insurers under the MFA to the possibility that HUD might do in the future was unripe. 52 F.3d at 1362-1363.

Much of our criticism of the extension of disparate-impact law to insurance could be framed as an argument that such a claim should not be recognized under the FHA. In the end, however, it is difficult if not impossible to separate the question whether such a claim may be stated under the FHA from whether it is preempted by the MFA. The uniquely disruptive potential of disparate-impact liability in the insurance context shows that that theory of liability should not be applied to insurance under the FHA; the same threat of disruption shows that Congress precluded application of disparate-impact liability to insurance in the MFA.

I. DISPARATE-IMPACT LIABILITY IN THE INSURANCE CONTEXT PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE

It is difficult to overstate the dramatic effect on insurance, and on state regulation of insurance, that would result from extension of disparate-impact liability to the provision and pricing of insurance. Insurers set rates based upon risk, and because they cannot as a practical matter establish the risk for each individual, they have traditionally relied on the risk characteristics of groups. As Judge Easterbrook has explained, "[i]nsurance works best when the risks in the pool have similar characteristics," and "[t]o curtail adverse selection, insurers seek to differentiate risk classes with many variables." *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992).

In a society where risk is not distributed equally, efforts designed to measure risk will inevitably have disparate effects on various groups. Given residential housing patterns and the uneven distribution of wealth and risk in the United States, it is possible that some of those measures, even if entirely race-neutral in both form and intent, may have disparate effects on non-Caucasians. Thus, under federal disparate-impact law, there may well be circumstances in which a plaintiff can establish a disparate impact sufficient to shift the burden to the defendant insurer to demonstrate that its methods of evaluating risk are supported by a "business necessity." Even once the insurer makes that showing, the plaintiff still may prevail by showing that the insurer could employ an alternative method of rate-setting that would meet its business needs while causing a less disparate impact on non-Caucasians. *Cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). The result is foreseeable: extensive litigation after which federal courts may require insurers to alter their state-sanctioned rate structures in order to re-

duce the adverse effect of those structures on non-Caucasians in the aggregate.[16]

Such a result would work a revolution in the regulation of insurance in this country. Whether an insurer's rates are actuarially justified, and whether those rates unfairly discriminate within or against any group, are issues squarely within the province of state insurance regulators. If federal courts and lay jurors[17] were to become involved in such determinations, they would have to master a complex body of actuarial analysis best reserved for expert state regulators (and, since this case has been brought as a nationwide class action, to do so for all 50 States). Even if the insurer could demonstrate that the challenged factor is justified by its business needs, the jurors would still have to evaluate the plaintiff's proffer of an alternative rate-setting method to determine, based inevitably upon speculation, whether that method would both reduce the disparate impact and comparably serve the insurer's business needs in a way consistent with the requirements of state insurance law.

There is no reason to believe that credit scoring will be the only rating factor to face a disparate-impact challenge. Many factors used in ratemaking for homeowners insurance—ranging from geographic location to type of residence to number of residents—may have a disparate impact on particular racial or ethnic groups. Every such factor is ripe

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[16] Although our analysis focuses on disparate-impact claims arising under the FHA, analogous claims arising under other statutes may also interfere with state administrative regimes in violation of the MFA. By requiring no proof of intentional discrimination, yet inviting a searching reexamination of the actuarial justification of an insurer's state-sanctioned ratemaking methodology, disparate-impact claims (or their equivalents) are inherently disruptive. For this reason, the Third and Seventh Circuits have held that certain claims arising under the Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, contravene the MFA. *See infra* pp. 26-28.

[17] Plaintiffs have demanded a trial by jury, which must be granted upon the request of either party in an action for damages under the FHA. *See Curtis* v. *Loether*, 415 U.S. 189, 192 (1974).

for a potential challenge, and upon a showing of a differential effect, an insurer would be forced to justify its use of any such factor and the rates calculated thereby. If a court enjoined the use of one factor to evaluate risk, an insurer might seek to use other factors, but those alternative factors in turn could be challenged in subsequent lawsuits. Indeed, a state regulator could prohibit use of one factor in favor of a second factor, only to watch as a federal court then barred the use of the second factor. In this way, as Judge Jones observed in dissent, a federal court that focuses on a "single thread" could unwittingly unravel the "entire fabric" of insurance regulation. App. 14a.

Worse still, the judge and jury might upset policy judgments appropriately crafted by state legislatures and regulators. Insurance is regulated by the States as a public good; state regulators balance the interests of numerous sectors of society in determining whether rates are lawful. A federal court entertaining a disparate-impact suit, however, has no broad warrant to consider the public interest; disparate-impact litigation focuses on the legal rights of the particular individuals before the court. Hence, a court applying disparate-impact law might well enjoin the use of a rating factor that state regulators have approved or accepted precisely because it benefits the general public by ensuring that those who pose a low risk of loss pay commensurately low rates. By forcing a reallocation of rates in order to reduce their disparate impact on non-Caucasians, the court could effectively force low-risk consumers to pay more than is warranted.

Precisely because insurance is a public good, the States are actively involved in combating insurance discrimination. Every State has laws that specifically address unfair discrimination in the provision of insurance. Texas is no exception, and its law clearly *excludes* this type of disparate-impact suit. Article 21.21-6 of the Texas Insurance Code prohibits unfair discrimination in insurance practices because of race, color, religion, national origin, age, gender, marital status, geographic location, or disability. Tex. Ins.

Code art. 21.21-6, § 3. The statute provides that discrimination is not unfair if "based upon sound underwriting or actuarial principles reasonably related to actual or anticipated loss experience," *unless* the discrimination is on the basis of race, color, religion or national origin. *Id.* § 4(a). This provision clearly indicates that the statute reaches only disparate *treatment*, because the actuarial defense is an insurer's only means of defeating a disparate-impact claim once a differential effect upon a protected class is shown. If an insurer could not use this defense in cases alleging disparate impact on the basis of race, color, religion, or national origin, then a plaintiff would automatically win merely by showing that the challenged practice affected one such group more than another. The possibility of such an absurd result clearly demonstrates that Texas' prohibition of unfair discrimination does not provide a disparate-impact cause of action.[18]

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[18] Indeed, Article 21.21-6 does not provide a private right of action of *any* type. Instead, its enforcement is entrusted to state regulators. *See Perez ex rel. Perez* v. *Blue Cross Blue Shield of Texas, Inc.*, --- S.W.3d ---, 2003 WL 22964281, at *5-*6 (Tex. Ct. App. Dec. 18, 2003).

Texas also has a statute that prohibits "unfair discrimination between individuals of the same class and of essentially the same hazard." Tex. Ins. Code art. 21.21-8, § 2. As Texas courts have noted, " '[w]hile article 21.21-6 prohibits discrimination based on differential treatment of members of *different classes*, article 21.21-8 prohibits discrimination based on differential treatment between individual members *within the same class*.' " *Perez*, 2003 WL 22964281, at *6 (quoting *Cortez* v. *Progressive County Mut. Ins. Co.*, 61 S.W.3d 68, 73 (Tex. Ct. App. 2001), *pet. granted, judgm't vacated pursuant to settlement*) (emphases in *Cortez*). Article 21.21-8 "is the latest in a long series of Texas statutes designed to prohibit *disparate treatment* between insureds of essentially the same risk." *Cortez*, 61 S.W.3d at 74 (emphasis added).

In addition to these laws specifically targeting insurance discrimination, Texas has its own fair housing act, *see* Tex. Prop. Code §§ 301.001 *et seq.*, and also has a regulation that, like HUD's regulation, applies the act to homeowners insurance, *see* 40 Tex. Admin. Code § 339.4(b)(4). It would be improper to assume, however, that the Texas fair housing law would be extended to prohibit disparate racial impacts in the provision and pricing of homeowners insurance. Indeed, it is uncertain that Texas' fair housing law permits recovery under a disparate-impact theory at all. Given that Texas—unlike the federal government—has created a wholly separate

Moreover, Texas has, subsequent to the filing of this lawsuit, enacted a law that *explicitly* permits credit scoring under certain conditions. *See supra* pp. 8-9. The court of appeals concluded that that law was irrelevant to this case because it was "not retroactive." App 8a-9a n.5. But this suit illustrates why even prospective relief—which plaintiffs also seek—would deeply disrupt state insurance regulation. Application of the FHA to enjoin the use of credit scoring in the future would "frustrate a[] declared state policy" in the most basic way and would "directly conflict with state regulation." Thus, even if respondents could recover damages based on petitioners' past use of credit scoring, the MFA would plainly prohibit the courts from applying the FHA to prohibit the prospective use of credit scoring.

Just as the determination of *liability* would interfere with state administrative regimes, so too would the allocation of *remedy*. Many States, for example, have adopted some version of the filed rate doctrine, which bars any action for damages based on an allegation that a rate approved by a regulator is excessive, inadequate, or discriminatory.[19]

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body of anti-discrimination law specifically targeting insurance, it is highly unlikely that Texas would impose disparate-impact liability under the state fair housing law to homeowners insurance in such a radical fashion. Texas is free to do so, of course, but the point of the MFA is that such broad policy determinations should be made by state officials, not federal courts.

[19] *See, e.g., Birmingham Hockey Club, Inc.* v. *National Council on Compensation Ins., Inc.*, 827 So. 2d 73, 83 n.11 (Ala. 2002); *American Bankers' Ins. Co. of Fla.* v. *Wells*, 819 So. 2d 1196, 1203-1204 (Miss. 2001); *N.C. Steel, Inc.* v. *National Council on Compensation Ins.*, 496 S.E.2d 369, 372-374 (N.C. 1998); *Prentice* v. *Title Ins. Co. of Minn.*, 500 N.W.2d 658, 662-663 (Wis. 1993). As this Court has noted, the goals of the filed rate doctrine are two-fold: preventing the rate discrimination that would ensue if individual plaintiffs were allowed to challenge rates, *see, e.g., Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1981), and avoiding judicial entanglement in the rate-setting process, *see, e.g., Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951). In those States that adhere to the filed rate doctrine, the interference with the state administrative regime caused by disparate-impact suits would be particularly great. Those States have deliberately crafted

Damages awards would also conflict with policies of many States that allow only prospective adjustments in judicial challenges to ratemaking to ensure that rate adjustments do not imperil insurers' overall revenue or ability to cover losses.[20]

For all these reasons, the nationwide extension of disparate-impact liability to insurance under the FHA would be a momentous policy change that ought not be undertaken without clear warrant from Congress, and may not be forced upon the States in light of the MFA. The disparate-impact theory of liability, originally crafted by courts to combat racial and gender disparities in employment caused by facially neutral hiring criteria such as intelligence testing, educational requirements, and size and strength thresholds, does not sensibly translate to the context of insurance rate-setting. If Congress wishes to take the dramatic step of enacting disparate-impact liability for insurers, it may do so in a law that "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). In the absence of such a law, the courts must give controlling effect to Congress's judgment, reflected in the MFA, that evaluations about the actuarial justification of insurers' practices should remain the province of state regulators rather than federal courts and jurors.

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an administrative scheme that assigns insurance rate challenges to the state insurance agency, which is most competent to handle such challenges, and not a court lacking expertise in insurance ratemaking.

[20] *See, e.g.*, N.C. Gen. Stat. § 58-36-20(b); *In re Surcharge Classification 0133 By Delaware Compensation Rating Bureau, Inc.*, 655 A.2d 295, 299-305 (Del. Super. Ct. 1994), *aff'd*, 655 A.2d 309 (Del. 1995) (Table); *Associated Indus. of Mass., Inc.* v. *Commissioner of Ins.*, 525 N.E.2d 670, 675 (Mass. 1988); *Caldwell* v. *Insurance Co. of North America*, 218 S.E.2d 754, 758 (Ga. 1975).

II. THE COURT OF APPEALS' DECISION, PERMITTING APPLICATION OF FEDERAL DISPARATE-IMPACT LAW TO INSURANCE, IS ERRONEOUS UNDER THE MCCARRAN-FERGUSON ACT

The MFA "grant[s] the States broad regulatory authority over the business of insurance." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 505 (1993). Every State has exercised that authority by requiring licensing of insurers and regulating the kinds of policies that insurers may offer. Each State also has a dedicated agency supervising insurers and retains power to regulate the rates that insurers may charge. The MFA is designed to protect this system, which has served the nation well, from unwarranted and unintended federal disruption. In particular, the MFA "seeks to protect state regulation primarily against inadvertent federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 39 (1996) (emphasis omitted).

The MFA "precludes application of a federal statute in face of state law 'enacted . . . for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relat[e] to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." *Humana*, 525 U.S. at 307 (quoting 15 U.S.C. § 1012(b)) (brackets and ellipsis in original). In *Humana*, the Court rejected the argument that "impair" is "interchangeable with 'invalidate' and 'supersede.' " *Id.* at 308 (selected internal quotation marks and brackets omitted). Rather, the Court interpreted Section 2(b) of the MFA to allow the application of federal law if and only if (1) the federal law "does not directly conflict with state regulation," (2) application of the law would not "frustrate any declared state policy," and (3) application of the law would not "interfere with a State's administrative regime." *Id.* at 310. In crafting this three-part test, the Court disapproved lower court decisions holding that federal law was displaced under the MFA only where it directly con-

flicted with state law. Emphasizing that the MFA broadly proscribes "interfere[nce] with a State's administrative regime," the Court rejected the notion that "Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Id.* at 309-310.

The court of appeals in this case gave short shrift to the third prong of the *Humana* test. The panel suggested that, because petitioners had not identified a specific "state law or policy that would be impaired by the application of the federal statutes, it is impossible for them to prevail on the third *Humana* prong, i.e., a finding of impairment caused by the application of the federal law." App. 8a. *Humana*, however, quite clearly does *not* require a showing that application of the federal law would impair a specific substantive state law or policy. Indeed, the Court rejected that position in *Humana* when it ruled that federal law also may not be applied if it would "interfere with a state administrative regime," and disapproved earlier decisions holding that only a direct conflict between federal and state law would suffice to preclude application of federal law. Elsewhere, the panel simply ignored the third prong, such as where it summarized the *Humana* preemption test as "turn[ing] on one of two axes: (1) the existence of an express conflict with the letter of the state law; or (2) the frustration of an officially articulated state regulatory goal." App. 3a.

Where the panel did specifically address the third *Humana* prong, it incorrectly understood petitioner to argue that the third prong amounts to "field preemption," such that federal law may not be applied to insurance "if the state has a mechanism in place for performing an insurance-related function and the federal law enters that regulatory arena." App. 11a. Plainly, the third prong of *Humana* does not hold that the mere existence of state regulation of insurance is sufficient to oust federal law; if that were the case, then the two other prongs would be surplusage. The third prong requires interference with the state administrative

regime—in essence, a hampering of the authority of the State to regulate insurance in the public interest.

Had the court of appeals properly applied this third prong, it would have concluded that application of a federal disparate-impact claim to insurance would unavoidably (and impermissibly) interfere with the States' ability to regulate insurance to benefit the public—in stark contrast to the minimal federal intrusion in *Humana*.[21] First, because credit scoring directly implicates the calculation of insurance rates (unlike the simple fraud at issue in *Humana*), it squarely "affects the relation of insured to insurer and the spreading of risk—matters that this Court, in other contexts, has placed at the core of the McCarran-Ferguson Act's concern." *Barnett Bank*, 517 U.S. at 39.

Second, as we have explained, extension of the disparate-impact theory of liability to insurance would require federal courts and juries to reexamine insurers' actuarial assumptions in every case, and could lead them to invalidate the legislatively-mandated policy judgments of state insurance regulators who had accepted or expressly approved insurers' rate structures under state law. Moreover, if a federal jury were to reject an insurer's rate structure on the ground that some other rate structure might exert a less disparate effect upon non-Caucasians, it would impinge upon state regulators' duty to consider the interests of *all* state citizens. Such intervention by the federal courts could yield rate adjustments that would harm low-risk policyholders. *See supra* pp. 17-18.

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[21] In *Humana*, the Court held that the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, did not interfere with Nevada's administrative regime. *Humana* involved garden-variety fraud—a scheme to overbill policyholders by concealing large discounts on the insurer's portion of hospital charges for care provided to policy beneficiaries. Although the Nevada Insurance Commissioner had authority to investigate charges of insurance fraud, federal law posed no threat to the efficaciousness of the state regulatory mechanism because federal and state law differed only slightly, and only with respect to the type of recovery permitted. *See Humana*, 525 U.S. at 311-313.

Third, the remedies available in such a federal lawsuit are quite different from the remedies customarily provided by the several States in the insurance context. In *Humana*, although the federal and state remedies available for fraud were not identical, the Court emphasized certain fundamental similarities: (1) both state and federal law permitted private rights of action, and (2) damages available under state law were comparable to, and indeed potentially greater than, the damages available under the federal law. 525 U.S. at 312-313. Neither is the case here. Rather, numerous States explicitly forbid private rights of action to challenge rate-making decisions, and channel such challenges in the first instance to state regulators. The damages that respondents seek are also incompatible with state laws that expressly foreclose such relief. *See supra* pp. 20-21.

III. Other Circuits Have Recognized That Subjecting Insurers To Disparate-Impact Liability Under Federal Law Would Contravene The McCarran-Ferguson Act

The court of appeals stated that five circuits have determined "that the MFA does not prevent the application of federal anti-discrimination laws to the insurance industry." App 5a. In fact, no other circuit has held that the FHA establishes *disparate-impact* liability in the insurance context. Every case cited by the majority involved either claims of *intentional* discrimination, *see Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995); *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992); *Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), or allegations of fraud, *see Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir. 1995). Only one decision cited by the majority discussed the propriety of disparate-impact liability under the FHA at all, and only to observe that this theory of liability is entirely ill-suited to the insurance context. *See NAACP*, 978 F.2d at 290-291 (remarking that "the

nature of insurance" implies that "[r]isk discrimination is not race discrimination").[22]

Far from following the lead of other circuits, the court of appeals' decision conflicts with decisions of two other courts of appeals that have recognized that disparate-impact claims cannot be applied to insurance under federal anti-discrimination law without running afoul of the MFA. In *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), the Seventh Circuit was asked to determine whether an insurer's caps on medical insurance policy benefits for AIDS care violated the anti-discrimination rule of Section 302(a) of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12182(a), which does not require proof of intentional discrimination against disabled persons. As the Seventh Circuit recognized, applying that ADA provision to insurance caps would require the federal court to determine whether caps on disabling conditions were "actuarially sound and consistent with principles of state law." *Doe*, 179 F.3d at 564. For that reason, the court concluded that such an application of the ADA would fail the third prong of the *Humana* test and thus would contravene the MFA. *Id.* at 563-565. As Judge Posner observed: "[s]tate regulation of insurance is comprehensive and includes rate and coverage issues, so if federal courts are now to determine whether caps on disabling conditions (by no means limited to AIDS) are actuarially sound and consistent with principles of state law they will be stepping on the toes of state insurance commissioners." *Id.* at 564 (citation omitted).

The court of appeals in *Doe* stressed that the MFA does not affect federal civil rights laws insofar as such laws forbid *intentional* discrimination; rather, the MFA preempts such laws when their application would require the federal court to reexamine the actuarial justification of the insurer's state-sanctioned decisions:

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[22] The *Nationwide* case also discussed the application of disparate-impact liability to insurers under the FHA, but dismissed a challenge to such an application of the FHA as unripe. *See supra* p. 15 n.15.

> It is one thing to say that an insurance company may not refuse to deal with disabled persons; the prohibition of such refusals can probably be administered with relatively little interference with state insurance regulation .... It is another thing to require federal courts to determine whether limitations on coverage are actuarially sound and consistent with state law. Even if the formal criteria are the same under federal and state law, displacing their administration into federal court—requiring a *federal* court to decide whether an insurance policy is consistent with *state* law—obviously would interfere with the administration of the state law. The states are not indifferent to who enforces their laws.

Id. (emphases in original).

The Third Circuit has similarly held that the MFA forbids applying federal law to insurance where (as here) to do so would require the court to decide whether insurance disparities were actuarially justified. In *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), the Third Circuit ruled that the MFA precludes applying the ADA to invalidate differential caps for mental and physical health care benefits. Because interpreting the ADA in this way would require insurers to prove the actuarial soundness of their insurance plan, the court held that such a requirement—which would apply equally to *any* disparate-impact claim in the insurance context—would produce "a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff." *Id.* at 612. The court stressed that "requiring insurers to justify their coverage plans elevates this court to the position of super-actuary. This court is clearly not equipped to become the watchdog of the insurance business[.]" *Id.*

Even though the *Doe* and *Ford* cases arose under the ADA and not the FHA, their inconsistency with the decision below is patent and significant. The Third and Seventh Cir-

cuits have recognized that, in light of the MFA, federal law should not be construed in a manner that will lead to federal courts routinely reexamining the actuarial assumptions of insurers' rate structures, especially where those structures are subject to review by state regulators. The Fifth Circuit has failed to apprehend this important lesson. The Fifth Circuit's decision also casts a significant shadow of uncertainty over a race-neutral insurance tool that has gained broad acceptance as a strong predictor of risk of loss, and thus a valid method of appropriately tailoring insurance rates to reflect each policyholder's risk of loss—no more and no less. On a matter of such importance to the insurance industry in particular and to the national economy more generally, this Court's review of the decision below is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSE C. DEHOYOS; EVA PEREZ-DEHOYOS; GEORGIA HARRISON; CHARLES WHITE; SHERYL H. FRANKS; MARTEL SHAW, PLAINTIFFS-APPELLEES,

v.

ALLSTATE CORPORATION; ALLSTATE INSURANCE COMPANY; ALLSTATE TEXAS LLOYD'S; ALLSTATE INDEMNITY COMPANY, DEFENDANTS-APPELLANTS.

No. 02-50721

Sept. 3, 2003

[345 F.3d 290]

Appeal from the United States District Court for the Western District of Texas.

Before DAVIS, JONES and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judges:

This interlocutory appeal presents a preemption question. Six members of a proposed class of non-Caucasian insurance customers instigated this Civil Rights action against Appellants Allstate Insurance Corp. *et alia* (Appellants or Allstate), alleging that Allstate engages in racially discriminatory business practices in violation of 42 U.S.C. §§ 1981 and 1982 of the Civil Rights Act of 1866, and in violation of the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.* Appellants filed a Rule 12(b)(6) motion to dismiss, arguing that the anti-preemption provision of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), precludes application of federal anti-discrimination laws to the controversy at bar. The district court denied the motion, finding that the application of the

civil rights statutes was not precluded by the McCarran-Ferguson Act, but simultaneously granting leave for this interlocutory appeal. We find that the McCarran-Ferguson Act does not bar Appellees' claims, and consequently we affirm the ruling of the district court.

I.

Appellees are six non-Caucasian Allstate policyholders who instigated this action alleging racially discriminatory pricing practices on the part of Appellants Allstate, *et al.* in violation of 42 U.S.C. §§ 1981 and 1982 of the Civil Rights Act of 1866 and in violation of the FHA, 42 U.S.C. § 3601 *et seq.* Specifically, Appellees allege that Allstate uses a "credit-scoring system" to target non-Caucasian customers for the sale of more expensive insurance policies than those directed at Caucasian customers. Similarly, the credit-scoring system is allegedly used to "place" non-Caucasian applicants into more expensive policies than those polices [sic] into which Caucasian applicants are placed.[1]

Appellees filed a three-count class action complaint. Appellants filed a motion to dismiss, arguing, *inter alia*, that Appellees' **[294]** claims are preempted by the McCarran-Ferguson Act. The district court denied the motion to dismiss in all regards. However, at the conclusion of its memorandum opinion, the district court noted that the order involved "controlling questions of law as to which there are substantial grounds for difference of opinion." The district court went on to suggest, *sua sponte*, that it would "look favorably upon a properly and timely filed motion for leave to file an interlocutory appeal." Appellants so filed, and that interlocutory interrogatory is now before this Court. *See* 28 U.S.C.A. § 1292. The preemptive effect of the McCarran-Ferguson Act constitutes the sole point of appeal.

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[1] The dissent invites us to label Appellees' claims under §§ 1981 and 1982 a diversion and to comment on the merits of those claims. We decline to go beyond the preliminary questions presented by this interlocutory appeal.

II.

Where, as here, a district court's ruling on a 12(b)(6) motion to dismiss is based entirely on conclusions of law, this Court reviews that determination *de novo*. *See Malina* v. *Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993). The sole issue before this Court is whether the McCarran-Ferguson Act precludes the application of §§ 1981 and 1982 of the Civil Rights Act of 1866 and the FHA to the insurance pricing schemes at issue here. The McCarran-Ferguson Act (MFA) provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.[2]

15 U.S.C. § 1012(b).

A. *Humana Inc.* v. *Forsyth*

The Supreme Court outlined the framework in which MFA preemption questions are to be addressed in *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999). In *Humana*, the Court reviewed whether the application of RICO in an insurance context was preempted by the MFA. In finding that RICO was not preempted by the MFA, the Court expressly rejected the view that the MFA authorized a state-supremacy "field preemption" approach to the application of federal law to the insurance industry. Instead, the Court emphasized that MFA preemption is to be examined within a "conflict preemption" rubric, and that, as such, the analysis will turn on one of two axes: (1) the existence of an express conflict with the letter of the state law; or (2) the frustration of an officially articulated state regulatory goal. Moreover, the Court rejected an implicit presumption against the application of federal law in insurance contexts, stating instead that federal law is to be

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[2] The Act goes on to expressly exempt the Sherman Act (1890), the Clayton Act (1914), and the Federal Trade Commission Act (1914).

applied in an insurance context where it can be applied in harmony with state law.

Additionally, the *Humana* Court found that RICO could be applied in harmony with the state law because, *inter alia*, the federal law did not proscribe conduct that the state insurance laws permit; the existence of different remedial regimes does not constitute an impairment of the state regulatory scheme; the federal law augmented and advanced state regulatory goals; and the federal law did not frustrate a *particular* and *declared* state regulatory policy.

In sum, in extremely clear and specific language the Court identified the following **[295]** three MFA preemption threshold requirements: (1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supercede that state law.[3]

We have not yet had occasion to pass upon the MFA preemption standard outlined by *Humana* within the context of applying § 1981, § 1982, or the FHA. However, this Court did recently consider MFA preemption in the context of the Federal Arbitration Act, 9 U.S.C. § 4 (FAA). In *American Heritage Life Insurance Co.* v. *Orr*, 294 F.3d 702 (5th Cir. 2002), we reviewed and rejected a challenge to the application of the FAA in an insurance context:

> The test under McCarran-Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superseded by the ap-

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[3] With similar clarity the *Humana* Court went on to articulate the following MFA "impairment" standard:

> [1] When federal law does not directly conflict with state regulation, and [2] when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.

Id. at 307, 310, 119 S. Ct. 710.

> plication of federal law. *Appellants fail to identify any statute that would be impaired, invalidated, or superseded by the application of the FAA.* Instead, Appellants try to perpetrate a judicial end-run by asserting that an attorney general's opinion or insurance department's regulatory, administrative policy is the functional equivalent of a state law relating to insurance, thereby triggering the provisions of the Act. Appellants' arguments are without merit.

Id. at 708. (emphasis added) (internal citations and quotation marks omitted). Thus, in *American Heritage* this Court concluded that MFA preemption would not be found merely because the state has a mechanism in place for regulating insurance contracts, nor could the state's putative disfavor of arbitration in the insurance context serve as a sufficient ground upon which conflict with the FAA could germinate. We found instead that

> [t]he party seeking to avail itself of the [McCarran-Ferguson] Act must demonstrate that application of the FAA would invalidate, impair, or supersede a particular *state law* that regulates the business of insurance.

Id. (emphasis in original).

Moreover, several of our sister circuits have passed squarely upon the question of MFA preemption with respect to § 1981, § 1982, or the FHA. Every circuit that has considered the question has determined that federal anti-discrimination laws may be applied in an insurance context, even where the state insurance agencies have mechanisms in place to regulate discriminatory practices. Specifically, the Eleventh, Seventh, Fourth, Sixth, and Ninth Circuits all have determined that the MFA does not prevent the application of federal anti-discrimination laws to the insurance industry.[4]

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[4] *See Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001); *NAACP* v. *Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992);

[296] In *Moore* v. *Liberty National Life Insurance Co.*, 267 F.3d 1209 (11th Cir. 2001), the Eleventh Circuit considered a challenge to the application of §§ 1981 and 1982 to allegedly racially discriminatory "red-lining" insurance practices. The Eleventh Circuit upheld the application of the federal anti-discrimination laws despite the fact that Alabama law purportedly implicitly authorized racially discriminatory practices which have an "actuarial basis." The Eleventh Circuit rejected the contention that allowing the application of federal civil rights statutes would frustrate or interfere with Alabama's policy of allowing discriminatory practices which were based on actuarial reality:

> We are asked to assume that the abolition of one form of discrimination, as codified in section 27-11-12, amounts to a clear declaration by the state that all other forms of discrimination, however invidious, are acceptable. We cannot construe Alabama's scheme of insurance regulation in such a formalistic and narrow way. *Absent more convincing evidence that racial discrimination in the insurance context is an integral part of Alabama's regulatory scheme, Liberty National's argument must fail.*
>
> . . . .
>
> . . . *[W]e . . . cannot conclude that Alabama intended to condone racial discrimination in its scheme of insurance regulation.* We therefore see no inconsistency between the state's interest in

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Mackey v. *Nationwide Ins.*, 724 F.2d 419 (4th Cir. 1984) (application of FHA in insurance context would not impair or supersede any state law, although North Carolina forbids discriminatory rates in the insurance business); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995) ("We conclude that the presence of additional remedies in the Fair Housing Act does not cause the Act to invalidate, impair or supersede Ohio insurance law. Accordingly, we hold that the McCarran-Ferguson Act does not preclude HUD's interpretation of the Fair Housing Act."); *Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995) (following *American Family* and holding that federal regulation that provides additional remedies to those provided under state insurance plan does not violate MFA).

> preventing "unfair discrimination" between individuals with similar life expectancies and the paramount national interest in preventing racial discrimination in the contexts articulated by §§ 1981 and 1982. *The two nondiscrimination principles complement each other, and Liberty National has not demonstrated that the federal statutes at issue impinge on any declared state policy in the insurance context.* Therefore, the McCarran-Ferguson Act does not require the reverse-preemption of plaintiffs' §§ 1981 and 1982 claims.

Id. at 1222-23 (emphasis added).

Similarly, in *NAACP* v. *American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), the Seventh Circuit found an FHA challenge to an allegedly racially discriminatory practice of "red-lining" was not barred by MFA preemption. The Seventh Circuit noted that:

> If Wisconsin wants to authorize redlining, it need only say so.... American Family has not drawn to our attention, however, any law, regulation, or decision in Wisconsin requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law.... No official of Wisconsin has appeared in this litigation to say that a federal remedy under the Fair Housing Act would frustrate any state policy. Although the McCarran-Ferguson Act gives states the final word on the regulation of insurance unless Congress specifically overrides their choices, Wisconsin's word is consistent with the Fair Housing Act.

Id. at 297.

Additionally, the same issues were reached and accord was found in every **[297]** circuit which has reviewed a MFA preemption challenge to the application of § 1981, § 1982, or the FHA in an insurance context.

B. *Humana* Standard Applied to the Controversy at Bar

Here, all parties agree that the sections of the civil rights statutes under which Appellees seek relief do not "specifically relate to the business of insurance." Therefore, the first *Humana* threshold requirement is met. The resolution of the preemption question then turns on whether the second two prongs can be met: whether there exists a state law or official policy which is directed at the regulation of insurance, and whether application of § 1981, § 1982, and the FHA to the insurance practices at issue here would "impair" that state insurance law. Here, however, Appellants' ability to invoke the MFA preemption fails on both fronts. First, and most importantly, Appellants do not point to any law with which the federal civil rights laws conflict, nor do they direct this Court to any declared regulatory policy which the application of these statutes would frustrate. Moreover, because Appellants do not identify a state law or policy that would be impaired by the application of the federal statutes, it is impossible for them to prevail on the third *Humana* prong, i.e., a finding of impairment caused by the application of the federal law.

The above analysis notwithstanding, Appellants generally contend that the application of federal law to the practices at issues here would impair the state law of Florida and Texas. Under *Humana*, to impair state law, the federal law must either directly conflict with state regulation, frustrate a declared policy, or interfere with an administrative regime.[5] **[298]** Appellants argue that the application of the

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[5] Appellants also urge us to entertain two additional theories of preemption. The first argument, dubbed the "filed rate" argument, is presented to us for the first time in this interlocutory appeal. As an initial matter, we observe that we consider issues raised for the first time on appeal "*only* 'in extraordinary instances . . . to avoid a miscarriage of justice.' " *Martinez* v. *Tex. Dep't of Criminal Justice*, 300 F.3d 567, 573 (5th Cir. 2002) (emphasis in original) (quoting *Doleac* v. *Michalson*, 264 F.3d 470, 492 (5th Cir. 2001)). Moreover, although we have discretion to review on interlocutory appeal those issues which are "fairly included" in the appeal, we do not deem this argument to be fairly included, as it is, at best, ancillary to Appellants' primary arguments in support of preemption. *See*

Reserve Mooring Inc. v. *Am. Commercial Barge Line LLC*, 251 F.3d 1069 (5th Cir. 2001).

Regardless, however, we find Appellants' "filed rate" argument unpersuasive. The application of anti-discrimination laws cannot reasonably be construed to supplant the specific rate controls of Florida and Texas. The application of the civil rights laws cannot even supplant whatever anti-discrimination components may be inherent or express in the insurance rate controls which Florida and Texas may choose to adopt. If Florida or Texas had adopted a specific rate control law or policy that conflicted with the anti-discrimination policies manifested in the civil rights statutes, those states needed only to direct us to that specific law and we would have obligingly considered the purported conflict. Here, however, Appellants do not direct this Court to a direct conflict or to a frustrated and *declared* policy with respect to their filed rate argument. Florida and Texas have recently passed laws regulating credit scoring. *See* Act of June 26, 2003, 2003 Fla. Laws ch. 407, § 3 (to be codified at Fla. Stat. ch. 626.9741); Act of June 11, 2003, ch. 206, § 301, 2003 Tex. Sess. Law Serv. 907, 916 (Vernon) (to be codified at Tex. Ins. Code § 21.49-2U); Act of Feb. 25, 2003, ch. 1, § 3, 2003 Tex. Sess. Law Serv. 1, 2 (Vernon) (to be codified at Tex. Ins. Code § 5.141). However, these laws are not retroactive and thus have no bearing on Appellees' cause of action. Consequently, even were we inclined to address this argument for the first time on appeal, we would find it unavailing.

Appellants' "super actuary" argument is similarly flawed. Appellants argue that "if this case were allowed to proceed and the plaintiffs were able to show disparate impact, the district court will be required to . . . substitute its judgment for the judgment of each of the 50 state insurance departments regarding whether the use of credit scoring is appropriate." This construction, although colorful, is incorrect. Appellants' ominous description of the court's role as "super actuary" sitting in judgment on the specific insurance-rate policy preferences of Florida and Texas is fanciful. In engaging in the unremarkable task of determining whether specific conduct falls within the ambit of federal civil rights law, a court would no more become a "super actuary" than the court becomes a "super entrepreneur" each time the court must determine whether a discriminatory practice constitutes a business necessity. Appellants' attempt to distinguish the business of insurance from other businesses is unpersuasive. The business of insurance is distinguishable only in that Congress has protected the business of insurance from inadvertent federal preemption. Thus, our analysis is concerned only with whether the civil rights laws are in harmony with state regulation. We are not dissuaded from our preemption conclusion merely because a court may eventually be required to determine whether the complained-of conduct actually violates federal law.

civil rights statutes at issue here would frustrate Texas and Florida state insurance policy by frustrating the ability of those states to regulate insurance pricing policies. However, in this argument Appellants adopt entirely a "field preemption" posture, declining to direct the Court to a particular law or declared regulatory policy, and instead confining their argument to the observation that states regulate insurance pricing and then vaguely conjecturing that, somehow, "federal civil rights laws will interfere with and frustrate the abilities of states to regulate insurance rate making."[6]

Thus, if Appellants were to bring a proper motion to dismiss the disparate impact claims under this new theory, and the district court were to decline to dismiss the claims, it would be because the federal regulatory goal of disallowing racially discriminatory insurance pricing is in harmony with the state's goal of disallowing racially discriminatory insurance pricing. While Appellants persist in trying to mold the issues of this appeal into federalism questions, *Humana* makes clear that the field of insurance regulation is not reserved to the states exclusively, that federal law governs concurrently in the area, and that federal law will only be preempted where there is a statutory or policy *conflict*. Therefore, allowing the states to exercise exclusive or autonomous discretion in insurance regulation is not a valid rationale for finding MFA preemption.

[6] In support of this general impairment argument, Appellants rely heavily on *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), a case which is entirely inapposite. In *Doe*, there was an actual *state insurance law* which purportedly conflicted with the application of the ADA to the particular insurance question at issue. There, Illinois enacted a law which permitted caps on health care insurance for patients with AIDS. The state insurance law was challenged under the ADA, and the defendants raised a MFA defense. The Seventh Circuit was required to consider whether the state law conflicted with the ADA, because, if it did, then it would be necessary for the court to determine whether application of the ADA to the AIDS-cap question violated the MFA anti-preemption provision. The Seventh Circuit concluded that the state law did not violate the ADA, so no preemption was found.

Here, however, we have no state law which purportedly conflicts with the application of the civil rights statutes to the particular question of credit-scoring. Therefore, obviously, we cannot consider whether the nonexistent law violates the civil rights statutes such that the application of the civil rights statutes could potentially violate the MFA. The problem here, as elsewhere in Appellants' analysis, is that there simply is no state law for us to consider.

Obviously this assertion is not nearly enough to withstand *Humana* scrutiny. Appellants cannot demonstrate that the federal law in question frustrates a policy associated with the regulation of insurance pricing without identifying an actual policy. Even filling in for Appellants the fact that Florida and Texas might adopt an **[299]** approach different from the approach embodied in the federal statutes, the mere fact that the two approaches are different is not sufficient to create a conflict. The approach of the federal statute must tread upon a declared policy goal of the state scheme. Here, as the district court correctly noted, "Defendants have not drawn the court's attention to any law, regulation, or decision in Texas or Florida requiring . . . [or] condoning" the credit-scoring practice at issue here.[7]

Instead, in adopting this view, Appellants and their supporting *amici* have implicitly adopted the position that the *Humana* Court's use of the phrase "or interfere with a State's administrative regime" means that if the state has a mechanism in place for performing an insurance-related function and the federal law enters that regulatory arena, then the federal law is "interfering" with the state's administrative regime. This interpretation, however, is manifestly at odds with both the facts and express holdings of *Humana*. In *Humana*, the Court expressly rejected a "field preemption" approach to MFA preemption, holding instead that federal and state law can concurrently affect the same issues and further the same goals as long as the federal law does not *frustrate* the state's *declared* policy. "Interference," then, is not synonymous with "a presence in the regulatory field." For example, in *Humana*, the Court found that although states have administrative regimes and mechanisms

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[7] Appellants argue that disparate impact claims are particularly likely to impair state law. We do not agree, and in any case the conflicts Appellants warn of are entirely conjectural. The dissent reiterates Appellants' argument but offers no more convincing evidence that disparate impact suits will necessarily impair state insurance regulation. We therefore decline to differentiate claims of disparate impact and claims of intentional discrimination at this preliminary stage of litigation.

in place to regulate insurance fraud, the question is not whether the state administrative regime has "occupied that field." Instead, the question is whether the regulatory goals are in harmony. RICO, the Court found, supplemented the state's mechanisms for eliminating insurance fraud, and consequently the purpose and goals of both RICO and the state insurance law were in alignment rather than conflict. This line of reasoning clearly demonstrates that the Court has rejected an interpretation of "interference" which is premised on the mere presence of federal law within a facet of insurance regulation for which the state already has an administrative regime in place.

Appellants, however, do not point to an insurance pricing regulatory goal which is hampered by the application of the civil rights laws to the credit-scoring practice at issue here, save the implied goal of allowing the states to pursue their pricing regulatory goals in isolation, which the *Humana* Court clearly rejected as a relevant state policy goal. We conclude, therefore, that the MFA does not preclude Appellees' claims.[8]

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[8] Appellants raise two additional arguments. First, Appellants contend that the enforcement of "private actions for damages" which are available under the civil rights statutes but not under the state scheme would serve to impair the state regulatory scheme. However, it is well-settled that the existence of additional remedies does not create a conflict with state law such that MFA preemption may be found. This argument has been expressly rejected by the Supreme Court in *Humana*, by the Fourth Circuit in *Mackey*, 724 F.2d at 421, by the Seventh Circuit in *American Family*, 978 F.2d at 296, by the Sixth Circuit in *Nationwide Mutual*, 52 F.3d at 1363, and by the Ninth Circuit in *Merchants Home Delivery*, 50 F.3d at 1491-92. We likewise reject it here.

In a similar vein, Appellants argue that the fact that the Florida and Texas departments of insurance regulation are investigating the practices at issue here demonstrates that the application of the federal laws in question would impair state law. Here, Appellants' argument is simply that Florida and Texas both have dedicated mechanisms for regulating discriminatory insurance rates, and that these departments regulate insurance prices with a particular expertise. However, the fact that the state also has a mechanism in place for performing a function which the federal law would affect does not create a conflict. Appellants must show that a conflict exists with a particular law, or that an inconsistency exists with

[300] III.

For the foregoing reasons the ruling of the district court with respect to the question of McCarran-Ferguson preemption is herein AFFIRMED.

EDITH H. JONES, Circuit Judge, concurring in part and dissenting in part:

With due respect to my colleagues, I cannot agree that this nationwide class action challenging insurers' use of credit scoring in the pricing of automobile and home owners' policies can proceed intact under the McCarran-Ferguson Act. The allegations of intentional race discrimination under 42 U.S.C. §§ 1981 and 1982 do not appear to be preempted,[1] but they are a diversion. Plaintiffs' principal attack is under the Fair Housing Act against the alleged disparate impact of a facially-neutral component of insurance pricing decisions.

The majority, in my view, fails to recognize that a disparate impact claim goes to the heart of the risk adjustment that underlies the insurance business. The Seventh Circuit cogently observed: "Risk discrimination is not race discrimination." *NAACP* v. *Am. Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992). Every insurer sets its prices according to the risk embodied in covering particular categories of customers. Thus, young male drivers pay higher premiums than young females or mature drivers because of the higher incidents of policy claims made by that group. To be sure, insurers inflict a disparate impact upon young male drivers, but hardly anyone argues that the impact is unjustified. The relevant inquiries are whether the price differential reasonably conforms to the risk differential and whether,

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state regulatory policy. Here, Appellants only argue that the states already have a scheme in place, and that is not enough to create an MFA preemption.

[1] In this court, §§ 1981 and 1982 have been confined to cases involving intentional racial discrimination, not disparate impact claims. *Arguello* v. *Conoco, Inc.*, 207 F.3d 803, 809 n. 9 (5th Cir. 2000); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986).

in a regulated rate system, the insurer has received an appropriate return.

State insurance commissions, like those of Florida and Texas, are set up to regulate rates by overseeing the insurance companies' assessment of risks and differential pricing decisions. Integral to the regulatory regime is a prohibition on "unfair discrimination" in pricing. Tex. Ins. Code Ann. art. 21.21-6 (Vernon 1981 & Supp.2003); Fla. Stat. ch. 627.031(2) (2002). No matter the exact statutory regime under which the commissions go about their business, they are called upon to balance, verify and make a quasi-legislative determination concerning the adequacy and appropriateness of rates. *Colo. Interstate Gas Co.* v. *Fed. Power Comm'n*, 324 U.S. 581, 589, 65 S. Ct. 829, 89 L. Ed. 1206 (1945) ("Ratemaking is essentially a legislative function."). Their responsibility is ultimately fulfilled by evaluating the companies' comparative risk determinations. Since risk determinations are mathematically complex and multi-faceted, unraveling a single thread, like credit scoring, that is a component of a risk **[301]** formula necessarily affects the entire fabric.

Viewed against this backdrop, it is plain that the instant class action inevitably draws federal courts into the mechanics of insurance pricing and, by the same token, must diminish the scope of action available to state insurance commissioners. The plaintiffs really make no pretense to the contrary, as they allege that the premiums charged to them using credit scoring are discriminatory, excessive, unfair, unconscionable, and unlawful. These terms are nearly identical to those in the statutes that guide the Texas and Florida insurance commissions. The plaintiffs, however, are asking the federal courts to examine one thread from the regulatory fabric, while state insurance commissioners remain responsible for the whole. There is thus a significant difference between intentional discrimination claims and disparate impact claims for purposes of McCarran-Ferguson.

The McCarran-Ferguson Act was designed precisely to prevent this type of federal interference with the states' prerogative of insurance regulation. The majority have not

only misunderstood the intimate connection between the plaintiffs' claims and insurance rate-making, but they have also interpreted the scope of McCarran-Ferguson preemption too narrowly, and they have misapplied lower court precedents. These errors require brief elaboration.[2] In *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999), the Supreme Court's analysis of McCarran-Ferguson preemption parallels its venerable tests for determining the supremacy of federal law over the states. Thus, the Court stated that:

> While we reject any sort of field preemption, we also reject the polar opposite of that view, *i.e.* that Congress intended a green light for federal regulation whenever the federal law does not collide head-on with state regulation. [The Court quotes a dictionary definition of "impair" in § 2(b).] The following formulation seems to us to capture that meaning and to construe, most sensibly, the text of § 2(b): when federal law does not directly conflict with state regulation, *and* when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.

Humana, 525 U.S. at 309-10, 119 S. Ct. 710 (emphasis added). *Humana* does not require a direct conflict with state law in order to compel preemption. It is enough that the federal law may "interfere with a State's administrative regime." The majority seems to ignore this clear alternative, however, by repeatedly, and incorrectly, demanding evidence of "an enacted law" or a "declared policy."[3]

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[2] Because the majority have correctly quoted § 2(b) of the Act and explained its general parameters, I will not repeat those matters here.

[3] *See, e.g.*, Maj. Opn. at 294 (stating that McCarran-Ferguson preemption "analysis will turn on one of two axises: (1) the existence of an express conflict with the letter of the state law, or (2) the frustration of an officially articulated state regulatory goal"); Maj. Opn. at 295 (noting that in *Humana* "the federal law did not frustrate a *particular* and *declared*

[302] While I would agree that it is too broad to argue that virtually "any federal claim will 'interfere' with the state regulatory regime," a contrast between the facts in *Humana* and the case at bar illustrates why the insurers here are not raising a field preemption defense. In *Humana*, the Court held that RICO law was not preempted by the McCarran-Ferguson Act. In that case, RICO claims were made against an alleged kick-back scheme between a health insurer and various hospitals in such a way that both the cause of action and its remedy ran parallel to those available under Nevada law. The RICO claim did not require a federal fact-finder to investigate the genesis of the insurer's rates, but only whether kick-backs had been illegally made. Further, Nevada authorized the policing of this kind of activity through private citizen lawsuits in its state court.

In this case, by contrast, any *post hoc* declaration that credit scoring is impermissible will require a federal court to determine, in order to assess damages, what a fair and "non-discriminatory" rate for the plaintiffs' policies would have been. A more complete overlap with the state insurance commissions' pricing decisions is impossible to conceive. Because of the sensitivity and complexity of the question of unfair policy price discrimination, both Texas and Florida have

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state regulatory policy" and also stating that the Supreme Court "identified the following three [McCarran-Ferguson] preemption threshold requirements: (1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supercede that state law"); Maj. Opn. at 297 ("Moreover, because Appellants do not identify a state law or policy that would be impaired by the application of the federal statutes, it is impossible for them to prevail on the third *Humana* prong, *i.e.*, a finding of impairment caused by the application of the federal law"); Maj. Opn. at 298 (noting that Appellants failed "to direct the Court to a particular law or declared regulatory policy" or identify "an actual policy"); Maj. Opn. at 299 (stating that "[t]he approach of a federal statute must tread upon a declared policy goal of the state scheme") and (that the appellants have not identified "any law, regulation, or decision in Texas or Florida requiring . . . [or] condoning the credit-scoring practice at issue here").

chosen not to permit plaintiffs to file individual lawsuits in state courts to challenge such decisions. *Key Western Life Ins. Co.* v. *State Bd. of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 849-50 (1961); *Int'l Patrol & Detective Agency, Inc.* v. *Aetna Cas. & Sur. Co.*, 396 So. 2d 774, 776 (Fla. Ct. App. 1981), *approved by* 419 So. 2d 323, 324 (Fla. 1982). Instead, both states have enacted administrative corrective regimes. The plaintiffs' disparate impact suit will thus interfere with the initial rate-making as well as the corrective procedures utilized by the states.

My colleagues take refuge in a string of appellate court decisions that they believe have approved FHA disparate impact cases against insurance companies. Unfortunately, they are wrong. Two of their principal cases pre-date the *Humana* decision and require direct conflict preemption, a plainly narrower test than that adopted in *Humana*.[4] *See Am. Family Mut. Ins. Co.* 978 F.2d at 295-96; *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140, 116 S. Ct. 973, 133 L. Ed. 2d 893 (1996). Additionally, both of those cases involved only intentional discrimination claims, not, as here, claims of disparate impact.

The single post-*Humana* appellate case in this area is *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001), *cert. denied*, 535 U.S. 1018, 122 S. Ct. 1608, 152 L. Ed. 2d 622 (2002). *Moore*, however, involved claims under §§ 1981 and 1982 of intentional racial discrimination in setting **[303]** premiums for life insurance. This case concerns auto and homeowners' insurance, not life insurance. Moreover, what I take issue with here is the claim founded upon the allegedly disparate impact of credit history, a facially neutral risk classification factor, utilized within a complex state regulatory scheme.

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[4] Likewise, two other cases upon which the majority rely also pre-date *Humana* and require a direct conflict with a state law. *See Merchs. Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995); *Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419, 421 (4th Cir. 1984).

The circumstances under which the McCarran-Ferguson Act was enacted by Congress further underscore the majority's error in holding that disparate impact claims under the Fair Housing Act are not preempted. In 1944, the Supreme Court held that insurance companies could be liable for antitrust violations under the Sherman Act for activities related to the setting of premiums. *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944). "In reaction to *South-Eastern Underwriters*, Congress 'moved quickly,' enacting the McCarran-Ferguson Act 'to restore the supremacy of the States in the realm of insurance regulation.' " *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 40, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996) (quoting *Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993)). In particular, one of Congress's primary concerns in enacting the McCarran-Ferguson Act was to exempt insurance *ratemaking activities* from the antitrust laws. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 221, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979). In other words, at the very core of the McCarran-Ferguson Act is the insulation of state regulation regarding the fixing of insurance rates from federal laws not specifically directed towards regulating insurance.

Whether credit scoring is useful or advisable as a device for insurance pricing, I cannot say. Florida and Texas have both recently passed laws allowing credit scoring on policies written after January 1, 2004, with numerous limitations. *See* Act approved June 11, 2003, 78th Leg., R.S., S.B. 14, §§ 3.01-3.04 (to be codified at Tex. Ins. Code Ann. art. 21.49-2U) (regulating use of credit scoring for purposes of rate setting and underwriting in, *inter alia*, residential property insurance and personal automobile insurance); 2003 Fla. Laws ch. 407 (to be codified at Fla. Stat. ch. 626.9741) (same); *see also* Act of Feb. 25, 2003, 78th Leg., R.S., ch. 1, § 3(c), 2003 Tex. Gen. Laws 1, 2 (requiring residential property insurers to provide reports to the Texas Insurance Commissioner regarding the use of credit scoring in underwriting and setting premiums). Other states' regulatory policies with re-

gard to credit scoring differ, according to the parties' briefs. But it seems clear to me that federal courts are not competent to tread in the essential domain reserved to state regulators. In today's case, credit scoring is alleged to have a disparate impact. Tomorrow, some other facially neutral criterion, such as the age of one's car or the number of one's dependents, or the city of one's residence, may fall under legal attack. Disparate impact claims under the Fair Housing Act are, in my view, squarely preempted by the McCarran-Ferguson Act and by *Humana*. On this aspect of the majority opinion, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE C. DEHOYOS, EVA PEREZ-DEHOYOS, GEORGIA HARRISON, CHARLES WHITE, SHERYL H. FRANKS, AND MARTEL SHAW, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

ALLSTATE CORPORATION, ALLSTATE INSURANCE COMPANY, ALLSTATE TEXAS LLOYD'S, AND ALLSTATE INDEMNITY COMPANY, DEFENDANTS.

No. Civ.A.SA01CA1010FB

April 5, 2002

[2002 WL 1491650]

ORDER DENYING MOTION TO DISMISS

BIERY, District J.

[1] Plaintiffs in this case essentially allege that Caucasians are in good hands with Allstate, but for non-Caucasians it is hands-off. The Court deduces defendants deny dastardly discriminatory dealings.

Before the Court are Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 8), Plaintiffs' Memorandum in Opposition to Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 20) and Defendants' Reply in Support of Motion to Dismiss (marked "Received" by the District Clerk on March 18, 2002). Also pending are Plaintiffs' Motion for Additional Pages for Plaintiffs' Response to Defendants' Motion to Dismiss (docket no. 19) and defendants' Unopposed Motion for Extension of Page Limit (docket no.

21). After careful consideration, the Court is of the opinion the motion to dismiss (docket no. 19) should be denied. The Court is also of the opinion that plaintiffs' motion for additional pages should be dismissed as moot as plaintiff's memorandum in opposition to defendants' motion to dismiss (docket no. 20) has been filed as part of the record in these proceedings. The Court is further of the opinion that defendant's unopposed motion for extension of the page limit (docket no. 21) should be granted such that Defendants' Reply in Support of Motion to Dismiss (marked "Received" by the District Clerk on March 18, 2002) should be filed as part of the record in these proceedings.

BACKGROUND

Six proposed class members from Texas and Florida bring this action against the defendant property and casualty insurers to challenge credit scoring as a form of unfair racial discrimination pursuant to which defendants charge non- Caucasians higher rates. According to plaintiffs' complaint, defendants obtain information from credit reports on each applicant and improperly factor this information into a secretive[1] credit scoring formula. Plaintiffs allege defendants use this credit-scoring system to place non-Caucasian applicants in more expensive types of policies and to target non-Caucasians for the sale of more expensive policies than the policies sold to similarly situated Caucasians. The complaint states that plaintiffs have been wrongfully discriminated against on the basis of race in violation of 42 U.S.C. § 1981 (the right to be free of racial discrimination in making contracts); 42 U.S.C. § 1982 (the right to be free of racial discrimination in buying real property); and 42 U.S.C. § 3604 (the Fair Housing Act).

Defendants contend plaintiffs' claims that they were charged unfairly discriminatory premiums should be dismissed because: (1) plaintiffs' claims are barred by the McCarran-Ferguson Act; (2) this Court should abstain from

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[1] Plaintiffs' assertion that "[d]efendants have consistently refused to disclose their credit algorithms" is undisputed.

deciding these issues under the *Burford* abstention doctrine; and (3) the complaint fails to allege facts which, if proven, would establish that defendants engaged in intentional discrimination. Plaintiffs maintain that the McCarran-Ferguson Act does not preempt their claims. They further contend that the *Burford* abstention doctrine does not prevent this Court from retaining jurisdiction and addressing plaintiffs' claims. Plaintiffs also argue that they have sufficiently alleged discriminatory intent.

STANDARD OF REVIEW

[2] Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint which fails to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A dismissal under rule 12(b)(6) is not a preferred avenue of adjudication and is looked upon with disfavor. *See Kaiser Aluminum & Chem. Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). In considering a rule 12(b)(6) motion, two general rules must be followed. *Id.* First, all well-pleaded facts in the complaint must be accepted as true, and a complaint should be liberally construed in favor of a plaintiff. *Id.* Second, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitled him to relief." *Id.* The Fifth Circuit has recognized two exceptions to the general rules. Where a complaint asserts merely conclusory allegations, a court should not accept as true these conclusory statements. *Id.* Also, where a complaint shows on its face it is barred by an affirmative defense, a court may dismiss the action for failing to state a claim. *Id.*

In determining whether a complaint states a claim upon which relief may be granted, a court must not look beyond the pleadings. *See Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489, 499-500 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). "[U]nless the pleadings on their face reveal beyond doubt that the plaintiffs can prove no set of facts that would entitle them to relief," a

12(b)(6) dismissal is improper. *Garrett* v. *Commonwealth Mortgage Corp.*, 938 F.2d 591, 594 (5th Cir. 1991).

DISCUSSION

The McCarran-Ferguson Act

The McCarran-Ferguson Act precludes the application of a federal statute in the face of state measures "enacted . . . for the purpose of regulating the business of insurance," if the federal law does not "specifically relate[ ] to the business of insurance," and would "invalidate, impair, or supersede" the state's regulations. *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 307 (1999); *see also* 15 U.S.C. § 1012(b). 42 U.S.C. § 1981, 42 U.S.C. § 1982 and the Fair Housing Act are not laws which "specifically relate[ ] to the business of insurance." This case, therefore, turns on whether the application of these federal anti-discrimination laws to plaintiffs' claims would "invalidate, impair, or supersede" Texas and Florida state laws regulating insurance. Defendants argue it would because: (1) both states have comprehensive insurance regulatory schemes and laws prohibiting discrimination in insurance; (2) state discrimination in insurance laws provide no private right of action; (3) state choices about the proper conduct of the business of insurance would be displaced; and (4) Texas and Florida insurance departments are investigating the effect of credit scoring on insurance.[2]

[3] Courts have consistently rejected the McCarran-Ferguson Act defense in race-based discrimination cases despite comprehensive state regulatory schemes and laws prohibiting discrimination in insurance. *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1223 (11th Cir. 2001) (McCarran-Ferguson Act does not prevent plaintiffs from proceeding with 42 U.S.C. § 1981 & 42 U.S.C. § 1982 race-based discrimination claims against insurer despite state statute prohibiting discrimination); *NAACP* v. *American Family Mut.*

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[2] Defendants contend that plaintiffs challenge "rate making" practices, while plaintiffs contend they challenge "underwriting tools." For purposes of defendants' motion to dismiss, the Court makes no differentiation between the two.

Ins. Co., 978 F.2d 287, 293-301 (7th Cir. 1992) (McCarran-Ferguson Act does not preempt plaintiff's 42 U.S.C. § 1981, 42 U.S.C. § 1982 & Fair Housing Act claims arising out of insurance company's racially discriminatory practices despite comprehensive state regulatory mechanisms and anti-discrimination laws in context of insurance), *cert. denied*, 508 U.S. 907 (1993); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (McCarran-Ferguson Act does not preclude application of Fair Housing Act to claims of discrimination in insurance through redlining even though state had procedures to regulate insurance and applicable state law prohibited such discrimination). This is true even though the state statutes prohibiting discrimination in insurance provide no private right of action. *NAACP*, 978 F.2d at 295, 297; *Cisneros*, 52 F.3d at 1363.

In the absence of a state practice authorizing the challenged action, "[n]othing in this conclusion permits federal law to displace states' choices about the proper conduct of the business of insurance." *NAACP*, 978 F.2d at 297. Defendants have not drawn the Court's attention to any law, regulation or decision in Texas or Florida requiring the challenged credit-scoring system, condoning this practice, committing to insurers all decisions about credit-scoring or holding that this credit-scoring system does not violate state law. *See id.* (placing burden upon defendant to show that state has authorized race-based discriminatory insurance practices); *see also Moore*, 267 F.3d at 1222 ("Liberty National has not demonstrated that §§ 1981 and 1982, applied to insurance contracts, frustrate any declared state policy, because they have not demonstrated that it is in fact the policy of Alabama to encourage or condone racial distinctions in the provision of life insurance."). Moreover, although investigations regarding the effect of credit scoring on insurance may be ongoing, no official of Texas or Florida has appeared to argue that a federal remedy under section 1981, section 1982 or the Fair Housing Act would frustrate any state policy. *See NAACP*, 978 F.2d at 297 (noting absence of state official who would state that "Wisconsin's word" is inconsistent with Fair Housing Act); *see also Moore*, 267 F.3d at 1222 (noting

that, as in *NAACP*, state official "had not intervened to argue that the federal law at issue would frustrate its scheme of insurance regulation.").

[4] Additionally, similar cases regarding discrimination in life insurance are pending in the Fifth, Second and Eleventh Circuits. *See In re Industrial Life Ins. Litig.*, MDL Nos. 1371, 1382, 1390, 1391, 1395 (E.D. La); *Moore* v. *Liberty Nat'l Life Ins. Co.*, No. CV-99-BU-3262-S (N.D. Ala.) *Thompson* v. *Metropolitan Life Ins. Co.*, Nos. 00 Civ. 5071(HB), 00 Civ. 9068(HB), 01 Civ.2090(HB) (S.D.N.Y.). Plaintiffs represent, without dispute by defendants, that "a number of state insurance departments conducted their own investigations into the claims raised in these cases." The McCarran-Ferguson defense was raised in *Moore*, although the Eleventh Circuit held that the Act did not apply to bar plaintiffs' 42 U.S.C. § 1981 and 42 U.S.C. § 1982 claims. *See Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1223 (11th Cir. 2001). The McCarran-Ferguson defense, plaintiffs maintain without challenge from the defendants, "was not even raised in the other cases."

Defendants state that "[p]laintiffs completely ignore the paradigm case for deciding this motion," *Doe* v. *Mutual of Omaha.* 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 845 (2000). In *Mutual of Omaha*, the Seventh Circuit held that an insurance policy with a cap on AIDS coverage did not violate Title III, the public accommodations provision, of the Americans With Disabilities Act ("ADA"). *Id.* at 559-65.[3]

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[3] This comports with the weight of authority from other circuit courts, including the Fifth Circuit. *McNeil* v. *Time Ins. Co.*, 205 F.3d 179, 187-88 (5th Cir. 2000) (Title III of the ADA does not apply to coverage terms of health insurance policy), cert. denied, 531 U.S. 1194 (2001); *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000) (disability plan which provided greater benefits for physical disabilities than for mental ones did not violate ADA); *Lenox* v. *Healthwise, Ltd.*, 149 F.3d 453, 453 (6th Cir. 1998) (ADA does not prohibit health insurance providers from differentiating between persons with different disabilities); *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998) (insurance policy limiting coverage for mental disabilities does not violate Title III), *cert. denied*, 525 U.S. 1093 (1999); *Parker* v. *Metropolitan Life Ins. Co.*,

"The common sense of the statute," the Court explained, "is that the content of the goods or services offered by a place of public accommodation is not regulated." *Id.* at 560. In this case, plaintiffs challenge access to insurance as opposed to the contents of the policy. *See id.* (There is a difference between refusing to sell a health-insurance policy at all to a person with AIDS, or charging him a higher price for such a policy, ... and ... offering insurance policies that contain caps for various diseases some of which may also be disabilities."). Defendants' motion to dismiss based on the McCarran-Ferguson Act is denied.

The Buford Doctrine

Defendants contend this Court should dismiss plaintiffs' claims under the *Buford* abstention doctrine. *Buford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). The Fifth Circuit has determined:

> Essentially, *Buford* instructs a district court to weigh the federal interests in retaining jurisdiction over the dispute against the state's interests in independent action to uniformly address a matter of state concern, and to abstain when the balance tips in favor of the latter.

Webb v. *B.C. Rogers Poultry, Inc.*, 174 F.3d 697, 700 (5th Cir.) (citations omitted), *cert. denied*, 528 U.S. 964 (1999). "But, this balance only rarely favors abstention." *Id.* (quoting *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 728 (1996)).

Defendants reurge their argument that this type of insurance issue is one regulated by the states. However, as defendants point out, relevant state statutes do not provide for a private cause of action under which plaintiffs could raise their claims. Only the federal anti-discrimination laws can provide plaintiffs with the relief they seek. Ordinarily, federal courts "have a virtually unflagging obligation ... to

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121 F.3d 1006, 1012 (6th Cir. 1997) (Title III does not regulate content of goods & services), *cert. denied*, 522 U.S. 1084 (1998).

exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). Additionally, there is a federal interest in this case as plaintiff's causes of action sound solely in federal law. *See id.* Finally, the Court does not find that adjudication of this matter would disrupt state efforts to establish coherent state insurance policies. *See McNeese* v. *Board of Educ.*, 373 U.S. 668, 674 (1963). This is not a case which involves federal claims which are "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Id.; see also See NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992) ("State and federal rules that are substantially identical but differ in penalty do not conflict with or displace each other."), *cert. denied*, 508 U.S. 907 (1993). Defendants' motion to dismiss based on the *Burford* abstention doctrine is denied.

Intentional Discrimination

[5] Defendants allege plaintiffs have not sufficiently alleged discriminatory intent. After careful consideration of defendants' arguments, plaintiffs' response and complaint, the Court is of the opinion that plaintiffs have sufficiently alleged discriminatory intent for rule 12(b)(6) purposes at this early juncture in these proceedings. To this extent, defendants' motion to dismiss is denied.

OPTIONS TO APPEAL

The Court is of the opinion this Order involves controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of this litigation. *See* 28 U.S.C. § 1292(b) (governing interlocutory appeals). If defendants choose to do so, the Court will look favorably upon a properly and timely filed motion for leave to file an interlocutory appeal. *See* Fed. R. App. P. 5 (governing requests for permission to appeal by permission); *see also* Fed. R. App. P. 8 (governing requests for stay pending appeal).

IT IS THEREFORE ORDERED that Before the Court are Defendants' 12(b)(6) Motion to Dismiss the Complaint (docket no. 8) is DENIED;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Additional Pages for Plaintiffs' Response to Defendants' Motion to Dismiss (docket no. 19) is DISMISSED as MOOT as plaintiff's memorandum in opposition to defendants' motion to dismiss (docket no. 20) has been filed as part of the record in these proceedings;

IT IS FINALLY ORDERED that defendants' Unopposed Motion for Extension of Page Limit (docket no. 21) is GRANTED such that the District Clerk is directed to file Defendants' Reply in Support of Motion to Dismiss (attached to the motion for leave and marked "Received" by the District Clerk on March 18, 2002).

It is so ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50721

JOSE C. DEHOYOS; EVA PEREZ-DEHOYOS; GEORGIA HARRISON; CHARLES WHITE; SHERYL H. FRANKS; MARTEL SHAW, PLAINTIFFS-APPELLEES,

v.

ALLSTATE CORPORATION; ALLSTATE INSURANCE COMPANY; ALLSTATE TEXAS LLOYD'S; ALLSTATE INDEMNITY COMPANY, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

[STAMP: U.S. Court of Appeals
FILED NOV 25, 2003
Charles R. Fulbridge III, Clerk]

ON PETITION FOR REHEARING EN BANC

(Opinion 9/3/03, 5th Cir., ____, ___ F.3d ____)

Before DAVIS, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Judge Jones would grant panel rehearing for the reasons set out in her dissent to the panel opinion.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

* Judge Wiener did not participate in the consideration of the rehearing en banc.